IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI EX REL. ANNA L. NICKELS,	)	
Petitioner-Relator,	)	
v.	)	Case No. SC83837
HON. DAVID LEE VINCENT, III, and HON. FRANK CONLEY,	)	
Respondents.	)	

RESPONDENTS' BRIEF

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JURISDICTIONAL STATEMENT

Relator challenges by petition for writ of prohibition or mandamus the propriety of a Judgment and Order of May 18, 2001 entered by the Respondent, The Honorable David Lee Vincent, III, Circuit Judge of St. Louis County, Missouri, dismissing Relator's claims against defendant Lifemark Hospital and granting defendant Brocksmith's motion to transfer venue to Boone County, Missouri on the basis of pretensive joinder. Relator previously sought a writ of prohibition and/or mandamus in the Missouri Court of Appeals for the Eastern District and the petition was denied. Relator then filed a petition for extraordinary relief in this Court and a preliminary writ in prohibition was issued as to Judge Vincent, Circuit Judge of St. Louis County, Missouri and Judge Conley, Circuit Judge of Boone County, Missouri. This court has jurisdiction to determine original remedial writs pursuant to Article V, Section 4 of the Missouri Constitution.

STATEMENT OF FACTS

Respondents offer their own Statement of Facts because Relator's Statement of Facts fails to provide an accurate representation of the procedural history of this case. It further references materials not before the circuit court, as described below.

All healthcare described in Relator's Petition for Damages occurred either in Boone County, Missouri or Morgan County, Missouri. (Petition for Writ, Exhibit A). Relator received no healthcare in St. Louis County, Missouri from any of the defendants. (Petition for Writ, Exhibit A). All defendants reside for venue purposes in Boone County or Morgan County with the sole exception of defendant Lifemark, which had a registered agent in St. Louis County. (Petition for Writ, Exhibit A , p. 56, ¶ 22) . All defendants were served with summons and process or waived service with the exception of defendant Danuser who has neither waived service nor been served. (Petition for Writ, Exhibit O, p. 223). All defendants who filed motions have challenged venue in St. Louis County, and defendant Curators sought dismissal summary judgment on sovereign immunity grounds. (Petition for Writ, Exhibit O, p. 223). Relator voluntarily dismissed without prejudice her claim against defendant Good Shepherd. (Petition for Writ, Exhibit O, p. 223).

On February 13, 2001, Defendant Brocksmith filed a timely Motion to Dismiss or Transfer for Improper Venue asserting pretensive joinder of defendant Lifemark d/b/a Columbia Regional (hereinafter "Lifemark"). (Petition for Writ, Exhibit E, p. 87).

On February 20, 2001, Relator filed a Response to Defendant Brocksmith's Motion to Dismiss or Transfer (Respondents' Appendix at A1) followed by Suggestions in Opposition on February 23, 2001. (Petition for Writ, Exhibit F, p. 92)[1].

On February 21, 2001, Defendant Lifemark filed a timely Motion to Dismiss asserting *inter alia* lack of subject matter jurisdiction, improper venue, failure to state a claim and statute of limitations. (Petition for Writ, Exhibit G, p. 98). On March 6, 2001, Defendant Lifemark filed Suggestions in Support of its Motion to Dismiss accompanied by affidavits and medical records. (Petition for Writ, Exhibit H, p. 100). Relator filed no response, opposition or objection to Defendant Lifemark's Motion to Dismiss, Suggestions or the accompanying exhibits.

On March 19, 2001, Defendants Buchert and Columbia Orthopaedic Group (COG) filed a Joint Motion to Dismiss or Transfer for Improper Venue. (Petition

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[1] Relator responded nominally to the Brocksmith Motion on February 20, 2001, but the response was actually argument directed substantively to the motion to dismiss filed on behalf defendant Steinke.

for Writ, Exhibit I, p. 194). No response to defendant Buchert and COG's Joint Motion was ever filed by the Relator.

On April 19, 2001, Defendant Lifemark mailed a Notice of Hearing to Relator calling up Lifemark's Motion to Dismiss for hearing on May 9, 2001. (Respondents' Appendix at A5).

On May 1, 2001, Defendant Brocksmith mailed to Relator a Notice of Hearing calling up his Motion to Dismiss or Transfer for Improper Venue for hearing on May 9, 2001. (Respondents' Appendix at A7).

On May 3, 2001, Defendant Brocksmith filed Reply Suggestions in Support of his Motion to Dismiss or Transfer for Improper Venue, referencing Defendant Lifemark's Suggestions in Support of its Motion to Dismiss as support for its Motion to Dismiss or Transfer. (Respondents' Appendix at A9).

On May 9, 2001, the St. Louis County Circuit Court, Judge Vincent, called and heard Defendant Lifemark's Motion to Dismiss and Defendant Brocksmith's Motion to Dismiss or Transfer for Improper Venue. (Respondents' Appendix at A18). Defendants Lifemark and Brocksmith appeared in person by counsel. Relator appeared through counsel by telephone. (Respondents' Appendix at A18).

The present proceeding concerns only the Motion to Dismiss of Defendant Lifemark and the Motion to Dismiss or Transfer For Improper Venue of Defendant

Brocksmith. No other motions were noticed or submitted at the May 9, 2001, hearing. (Respondents' Appendix at A18).

On May 18, 2001, Judge Vincent issued a Judgment and Order in favor of Defendant Lifemark sustaining its motion and dismissing Relator's claims against Defendant Lifemark. (Petition for Writ, Exhibit L, p. 211).

The May 18, 2001 Judgment and Order also ordered transfer of the case to Boone County, purporting to grant the Joint Motion to Dismiss or Transfer of defendants Buchert and COG. (Petition for Writ, Exhibit L, p. 211). The reference to defendants Buchert and COG was simply a clerical error due to the similarity between their motion and the motion filed by defendant Brocksmith, which raised identical issues and challenges. The Court's memorandum Order of May 9, 2001 indicates that only the motions of defendants Lifemark and Brocksmith were called and heard. (Respondents' Appendix at A18).

Relator attempts to supplement the record by utilizing an affidavit from Relator's counsel. (Petition for Writ, Exhibit J, p. 206). However, the May 9 hearing was not recorded. Respondents object to this improper supplementation of the circuit court record, which should be excluded and not considered by this Court.

Pursuant to Judge Vincent's Judgment and Order of May 18, 2001, this case was transferred to Boone County. Relator filed no motion for reconsideration of

this Judgment and Order in St. Louis County or in Boone County, and Relator has made no request for leave to amend her Petition or request for immediate certification of these issues for appeal.

Relator bypassed these other remedies and petitioned the Eastern District Court of Appeals for a writ of prohibition or mandamus, which was denied. The present writ proceeding followed.

POINTS RELIED ON

I. THIS COURT SHOULD QUASH ITS PRELIMINARY ORDER IN PROHIBITION AND DENY RELATOR'S REQUEST FOR A PERMANENT WRIT BECAUSE:

A. RELATOR FAILS TO STATE A CLAIM FOR EXTRAORDINARY RELIEF SUFFICIENT TO INVOKE THIS COURT=S DISCRETIONARY SUBJECT MATTER JURISDICTION IN THAT RELATOR DID NOT PLEAD OR PROVE AN EXCESS OF JURISDICTION BY THE TRIAL COURT, RELATOR HAS OTHER AVAILABLE AND ADEQUATE REMEDIES AND RELATOR WILL NOT SUFFER IRREPARABLE HARM IF THE REQUEST FOR WRIT RELIEF IS DENIED; AND

B. JUDGE VINCENT DID NOT EXCEED HIS JURISDICTION IN GRANTING LIFEMARK'S MOTION TO DISMISS IN THAT RELATOR FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AGAINST DEFENDANT LIFEMARK FOR THE THEORIES OF CORPORATE NEGLIGENCE, ORDINARY, VICARIOUS

LIABILITY AND VICARIOUS LIABILITY FOR OSTENSIBLE AGENTS.

II. RESPONDENTS ARE ENTITLED TO AN ORDER QUASHING THIS COURT'S PRELIMINARY ORDER IN PROHIBITION/ ALTERNATIVE WRIT OF MANDAMUS BECAUSE JUDGE VINCENT'S ACT OF SUSTAINING DEFENDANT LIFEMARK'S MOTION TO DISMISS AND SUSTAINING DEFENDANT BROCKSMITH'S MOTION TO TRANSFER FOR IMPROPER VENUE AND TRANSFERRING THIS CASE TO BOONE COUNTY WAS PROPER, IN THAT DEFENDANT LIFEMARK WAS PRETENSIVELY JOINED FOR THE SOLE PURPOSE OF OBTAINING VENUE.

ARGUMENT

I. THIS COURT SHOULD QUASH ITS PRELIMINARY ORDER IN PROHIBITION AND DENY RELATOR'S REQUEST FOR A PERMANENT WRIT BECAUSE:

A. RELATOR FAILS TO STATE A CLAIM FOR EXTRAORDINARY RELIEF SUFFICIENT TO INVOKE THIS COURT=S DISCRETIONARY SUBJECT MATTER JURISDICTION IN THAT RELATOR DID NOT PLEAD OR PROVE AN EXCESS OF JURISDICTION BY THE TRIAL COURT, RELATOR HAS OTHER AVAILABLE AND ADEQUATE REMEDIES AND RELATOR WILL NOT SUFFER IRREPARABLE HARM IF THE REQUEST FOR WRIT RELIEF IS DENIED; AND

B. JUDGE VINCENT DID NOT EXCEED HIS JURISDICTION IN GRANTING LIFEMARK'S MOTION TO DISMISS IN THAT RELATOR FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AGAINST DEFENDANT LIFEMARK FOR THE THEORIES OF CORPORATE NEGLIGENCE, ORDINARY VICARIOUS

LIABILITY AND VICARIOUS LIABILITY FOR OSTENSIBLE AGENTS.

Standard of Review

Relator's petition fails to state a claim supporting a grant of extraordinary relief and accordingly, this Court should quash the preliminary writ and deny Relator's request for a permanent writ. In deciding whether to grant extraordinary relief, this Court construes a petition for a writ liberally, accepting all properly pleaded allegations as true. *State ex rel. Missouri Dept. of Agriculture v. McHenry*, 687 S.W.2d 178, 184 (Mo. 1985). This Court is limited to review of the record made in the trial court below. *State ex rel. Dixon v. Darnold*, 939 S.W.2d 66, 69 (Mo. App. S.D. 1997). This Court does not weigh the evidence but may review the evidence for the purpose of determining whether there was any support for the trial court's ruling. *Id*.

A. Relator fails to state a claim for extraordinary relief sufficient to invoke this Court's discretionary jurisdiction in that Relator did not plead or prove an excess of jurisdiction by the trial court, relator has other available and adequate remedies and relator will not suffer irreparable harm if the request for writ relief is denied.

1. Relator fails to state a claim for extraordinary relief sufficient to invoke this Court's discretionary subject matter jurisdiction in that Relator did not plead an excess of jurisdiction.

This Court should decline to exercise its discretionary subject matter jurisdiction to grant the extraordinary relief Relator requests because she has failed to state a claim for this relief in her Petition for Writ. The defense of failure to state a claim may be raised by the Respondents at any time. Rule 55.27(g)(2).

"A petition for a writ is a separate proceeding invoking the original jurisdiction of the appellate court." *State ex rel. Consumer Programs Inc. v. Dowd*, 941 S.W.2d 716, 717 (Mo. App. E.D. 1997). The Missouri Rules of Civil Procedure apply to Relator's Petition for Writ. Rule 55.05 requires pleadings to contain "a short and plain statement of the facts showing that the pleader is entitled to relief . . . ." "A pleading which states no cause of action confers no subject matter jurisdiction a court can adjudicate, and is subject to dismissal." *Wright v. Mullen*, 659 S.W.2d 261, 263 (Mo. App. W.D. 1983) (citing *Niedringhaus v. Zucker*, 208 S.W.2d 211, 212 (Mo. 1948)). "Such a defect is jurisdictional." *Id*. (citing *State ex rel. MFA Insurance Co. v. Murphy*, 606 S.W.2d 661, 663 (Mo. 1980)).

Specifically in the context of prohibition, "[t]o engage the power of a court to adjudicate the prohibition remedy, the ground for the issuance of the writ must

clearly appear and every fact requisite for its issuance be alleged." *West County Care Center, Inc. v. Missouri Health Facilities Review Committee*, 773 S.W.2d 474, 476 (Mo. App. W.D. 1989)(citation omitted). The only power a court without subject matter jurisdiction possesses is the power to dismiss the action. Rule 55.27(g)(3).

Relator's Petition for Writ fails to state a claim. In Relator's Petition for Writ she lists what she perceives to have been errors of Judge Vincent but fails to make any allegations invoking the Court's jurisdiction to grant extraordinary relief under any of the three potential grounds for prohibition set forth by this Court in *State ex rel. Riverside Joint Venture v. Missouri Gaming Com'n*, 969 S.W.2d 218, 221 (Mo. 1998). Relator has not alleged in her Petition that Judge Vincent lacked personal or subject matter jurisdiction. Relator has not alleged in her Petition that Judge Vincent lacked the power to enter the Judgment and Order at issue herein or to transfer the case to Boone County. Relator has not alleged that she will suffer "absolute irreparable harm" if the writ does not issue or that there are important questions of law decided erroneously that will escape review and which will cause Relator to suffer a considerable hardship or expense. Relator's Petition for Writ utterly fails to state a claim for extraordinary relief.

Pursuant to Rule 55.27(g)(3), Relator's Petition must be dismissed because it fails to invoke the Court's jurisdiction to grant extraordinary relief.

2. Relator fails to state a claim for extraordinary relief sufficient to invoke this Court's discretionary subject matter jurisdiction in that Relator did not prove an excess of jurisdiction by Judge Vincent in granting Lifemark's motion to dismiss.

This Court has clearly limited the possible grounds for prohibition to three circumstances, only one of which has been alluded to by Relator here: "prohibition is appropriate where a lower tribunal lacks the power to act as contemplated." *State ex rel. Riverside Joint Venture v. Missouri Gaming Com'n*, 969 S.W.2d 218, 221 (Mo. 1998) (quoting *State ex rel. Richardson v. Randall*, 660 S.W.2d 699, 701 (Mo. 1983) and citing *State ex rel. Noranda Aluminum, Inc. v. Rains*, 706 S.W.2d 861, 862-63 (Mo. 1986) and *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 577 (Mo. 1994) (emphasis in original). Although not asserted in Relator's Petition for Writ or in her Points Relief On, Relator claims in her Suggestions in Support that "Judge Vincent exceeded his jurisdiction by issuing the May 18th ruling . . . ." (Petition for Writ, Suggestions in Support, p. 16).

The general rule in Missouri courts is that a writ of prohibition cannot be used to prevent or control a court's exercise of its own discretion, provided that the exercise is within the jurisdiction of the court. *State ex rel. K-Mart Corp. v. Holliger*, 986 S.W.2d 165, 169 (Mo. banc 1999) (citations omitted). Stated differently,

> Judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration; if reasonable persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.

State ex rel. Kansas City Southern Ry. Co. v. Mauer, 998 S.W.2d 185, 188 (Mo. App. W.D. 1999).

Relator's arguments that Judge Vincent exceeded his jurisdiction are incorrect. Judge Vincent's ruling was not in error. Furthermore, Judge Vincent's grant of the Motion to Dismiss and resulting transfer was not so "clearly against the logic of the circumstances then before the court" or "so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Id.*

Even if Judge Vincent's decision was in error, the fatal flaw in Relator's argument is that **a trial judge has the jurisdiction to commit error**. Article V, § 14 of the Missouri Constitution and Section 478.070, RSMo 2000, clearly gave Judge Vincent the power to rule on the motions at issue herein. This jurisdiction includes the power to commit error. *State ex rel. Schoenbacher v. Kelly*, 408 S.W.2d 383, 395 (Mo. App. E.D. 1966) (quoting *State ex rel. Leake v. Harris*, 67

S.W.2d 981, 982 (Mo. 1934) (other citations omitted). *See also Scott County Reorganized R-6 School Dist. v. Missouri Com'n on Human Rights*, 872 S.W.2d 892, 894 (Mo. App. S.D. 1994). Such errors do not entitle parties to extraordinary relief. "[T]he extraordinary writ of prohibition should not be used to allow an interlocutory appeal of alleged trial court error." *State ex rel. Clem Trans., Inc. v. Gaertner*, 688 S.W.2d 367, 368 (Mo. 1985) (citation omitted). "Interlocutory review of trial court error by writ of prohibition . . . should occur only in extraordinary circumstances." *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 577 (Mo. 1994) (citation omitted). Relator has neither alleged nor shown any extraordinary circumstances.

3. Relator fails to state a claim for extraordinary relief sufficient to invoke this Court's discretionary subject matter jurisdiction in that Relator has adequate and available remedies on appeal and Relator will not suffer irreparable harm if the request for writ relief is denied.

Prohibition is not appropriate when there is an adequate remedy on appeal, *Mummert*, 877 S.W.2d at 577, and Relator does have an adequate remedy on appeal. If Judge Vincent erred in dismissing defendant Lifemark, this issue can be raised when this dismissal becomes a final judgment when all issues as to all parties have been decided. While Respondent realizes that Relator's remedy on

appeal may not come for some time, "[t]he fact that the remedy by appeal may be unsatisfactory or inconvenient alone, will not invoke [the Court's] discretion for the issuance of the extraordinary writ of prohibition." *State ex rel. Grimes v. Appelquist*, 706 S.W.2d 526, 528 (Mo. App. S.D. 1986) (citation omitted). *See also, State ex rel. Connors v. Shelton*, 142 S.W. 417 (Mo. 1912); *State ex rel. Bernero v. McQuillin*, 152 S.W. 347 (Mo. 1913).

There are also numerous other remedies available to Relator, making extraordinary writ relief more clearly inappropriate. The dismissal of defendant Lifemark is not a final judgment, but rather is merely an interlocutory order. At any time before the final judgment as to all issues and parties, "a court may open, amend, reverse, or vacate an interlocutory order." *Coon v. Dryden*, 46 S.W.3d 81, 88 (Mo. App. W.D. 2001). Relator did not move Judge Vincent for reconsideration of his Judgment and Order. Relator also has not requested similar relief from Judge Conley. Relator did not request leave to amend her petition before or after the dismissal for failure to state a claim and pretensive joinder. Relator also did not request certification of this dismissal for immediate appeal.

Relator proceeded immediately to prohibition rather than availing herself of a multitude of other possible remedies. This abuse of prohibition has caused a waste of judicial resources. Prohibition should not issue when other adequate remedies are available. Based on the foregoing, Relator has failed to sustain her

burden of proof to be entitled to the extraordinary relief she requests in this writ proceeding. Respondents urge the Court to quash or vacate its preliminary order in prohibition/mandamus and to dismiss Relator's Petition.

B. <u>Judge Vincent did not exceed his jurisdiction in granting Lifemark's Motion to Dismiss in that Relator failed to state a claim upon which relief can be granted against Defendant Lifemark for the theories of corporate negligence, ordinary vicarious liability and vicarious liability for ostensible agents.</u>

1. Judge Vincent's dismissal of Relator's claim for corporate negligence was appropriate.

Judge Vincent was acting within his jurisdiction in dismissing Relator's claim based solely on an unrecognized cause of action. As a consequence, Relator's request for writ relief is inappropriate and the theory of corporate negligence should not be adopted by this Court. Relator contends that she has stated a cause of action against Lifemark under the theory of corporate negligence. (Relator's Brief, p. 18). Respondents do not dispute that, as stated in Relator's Brief, Pennsylvania has adopted this theory of liability. In fact, Pennsylvania appears to have the greatest number of reported cases on corporate negligence in the United States. Yet, this theory of liability is not generally accepted throughout the United States, and with good reason.

Respondents agree with the Relator that "[t]he doctrine of corporate negligence has never been formally recognized in Missouri . . . ." (Relator's Brief, p, 28). Yet, Relator asserts that the doctrine was "adopted" by the Western District Court of Appeals in the unreported opinion in *Harrell v. Total Health Care, Inc.*, No. WD 39809, 1989 WL 153066 (Mo. App. W.D. Apr. 25, 1989). (Relator's Brief, p, 28). This is not true.

Relator's contention that she stated a claim against Defendant Lifemark under the theory of corporate negligence is unpersuasive for two primary reasons. First, even if Missouri did recognize the theory of corporate negligence, Relator failed to state a claim under that theory against Defendant Lifemark. Second, the circumstances of this case do not lend well to any acceptance by this Court of the doctrine of corporate negligence in Missouri. Consequently, even if this were a review on the merits of Respondent's actions, Judge Vincent's dismissal of Defendant Lifemark's adoption of the theory of corporate negligence in this case would still be inappropriate.

Even if Missouri were to recognize the corporate negligence theory of liability, Relator's Petition for Damages fails to state a claim under the doctrine. In her Petition for Damages, Relator pleaded that Defendant Lifemark owed her the following four duties of care first described in *Thompson v. Nason Hospital*:

> (1) a duty to use reasonable care in the maintenance of safe and adequate facilities and equipment; (2) a duty to select and retain only competent physicians; (3) a duty to oversee all persons who practice medicine within its walls as to patient care; and (4) a duty to formulate, adopt, and enforce adequate rules and policies to ensure quality care for patients.

(Relator's Brief, p. 25-26) (quoting *Whittingon v. Episcopal Hospital*, 768 A.2d 1144, 1149 (Pa. Super. 2001) (citing *Thompson v. Nason Hospital*, 591 A.2d 703, 708 (Pa. 1991)). Relator then attempted to assert that Defendant Lifemark breached some of these duties and suffered damages as a result. (Petition for Writ, p. 78). Nowhere in her Petition for Damages, however, has Relator alleged that Lifemark breached the second duty under corporate negligence: the duty to select and retain only competent physicians. In fact, Relator admits this omission in her Brief on page 30.

In Relator's haste to proceed under a corporate negligence theory, she also failed to recognize and plead "that the hospital had actual or constructive knowledge of the defect or procedures which created the harm," which is also a requirement under *Thompson*, 591 A.2d at 708 (citations omitted).

A motion to dismiss for failure to state a claim may be sustained "where the facts essential to recovery are not pleaded." *Bramon v. U-Haul, Inc.*, 945 S.W.2d 676, 679 (Mo. App. E.D. 1997) (citation omitted). Consequently, Judge Vincent's

dismissal of Relator's Petition for Damages for failure to state a claim was not in excess of his jurisdiction.

Relator makes no argument in her Brief, nor does she allege any facts in her Petition for Damages, showing why the four corporate negligence duties should be imposed on Defendant Lifemark. "[A] duty exists when a general type of event or harm is foreseeable. . . . [F]oreseeability is established when a defendant is shown to have knowledge, actual or constructive, that there is some probability of injury sufficiently serious that an ordinary person would take precautions to avoid it." *Pierce v. Platte-Clay Elec. Co-op., Inc.*, 769 S.W.2d 769, 776 (Mo. banc 1989) (citations omitted). Relator's allegations of defects and insufficient procedures are so vague it is impossible to ascertain any comprehensible relationship between the defects and the harm Relator allegedly sustained. Relator therefore failed in her Petition for Damages to evoke any discernible duty on the part of Defendant Lifemark.

Furthermore, to assert a claim for breach of a hospital's duty of oversight, a plaintiff must be able "to point to a specific guideline or directive that has been ignored or improperly carried out." Mitchell J. Nathanson, *Hospital Corporate Negligence: Enforcing the Hospital's Role of Administrator*, 28 Tort & Ins. L.J. 575, 593 (1993) (citing *Rohe v. Shivde* 560 N.E.3d 1113 (Ill. App. 1 Dist. 1990); *Thompson v. Nason Hosp.*, 591 A.2d 703, 708 (Pa. 1991); and *Pedroza v. Bryant*,

677 P.2d 166, 170 (Wash. 1984)). Relator has not pointed to any specific guideline that Defendant Lifemark has not adopted or failed to enforce.

Relator asserts that Defendant Lifemark does not have infectious disease control programs in force but also pleads that Defendant Lifemark has failed to enforce its infectious disease control rules. This allegation shows Relator's claim was not based on any information or valid belief. She has no idea whether Defendant Lifemark has infectious disease control guidelines, much less how any were not followed. In line with Point II below, unsubstantiated allegations such as these evidence pretensive joinder. Judge Vincent recognized this and dismissed Relator's claims against Lifemark.

The Relator would like this Court to throw Missouri into the trap that has ensnared a number of other states. Enamored with the concept of expanding the liability of health care providers based on "corporate negligence" theories of liability, courts tend to adopt the doctrine of corporate negligence without obtaining any explanation of its implications or purpose or limiting its application in any way Mitchell J. Nathanson, *Hospital Corporate Negligence: Enforcing the Hospital's Role of Administrator*, 28 Tort & Ins. L.J. 575, 577 (1993). "Rather, the seminal cases in the area are cited over and over by subsequent appellate courts that blindly repeat the duties without expounding upon when and how they come into play." *Id*.

Clearly, Missouri will not fall into this trap. Even in the unreported case of *Harrell v. Total Health Care* cited by the Relator, the Western District Court of Appeals did not purport to make a complete and unrestricted adoption of the corporate negligence theory for Missouri. 1989 WL 153066 (Mo. App. W.D. 1989). The Court in *Harrell* held more narrowly that a hospital which conducted no investigation of a physician's competence and failed to review the physician's record of malpractice breached a duty to prevent a reasonable risk of harm to the plaintiff patient. *Id.* at *6.

The *Harrell* opinion dealt only with the second corporate negligence duty regarding the selection and retention of competent physicians. Notably, the present lawsuit contains no allegation that Defendant Lifemark breached this second duty. Relator's claims under the corporate negligence doctrine are a far cry from the narrow issue decided in *Harrell*.

The corporate negligence doctrine with its four duties actually has been recognized only in a few jurisdictions. *Gafner v. Down East Community Hosp.*, 735 A.2d 969, 979 (Me. 1999) (citations omitted). In addition, "[m]ost courts that have recognized the cause of action referred to as corporate liability have grounded the claim upon the responsibility of the facility to assure that physicians practicing in the facility are properly credentialed and licensed." *Id*. (citations omitted). This is precisely the duty not at issue in the present case. As a result, this is not the case

in which the Court should decide Missouri's acceptance of the corporate negligence doctrine.

In rejecting this same doctrine, the Supreme Court of Maine provided an extensive explanation of their decision in *Gafner v. Down East Community Hospital.* The concerns raised in *Gafner* which precluded adoption of corporate negligence as a theory of liability are equally applicable in Missouri. The Supreme Court of Maine listed its specific concerns regarding adoption of the doctrine, including its deference to the state Legislature in the highly regulated area of hospital administration, and concluded:

> [T]here exist serious and unanswered public policy questions regarding the wisdom of requiring hospitals to control the medical judgments and actions of independent physicians practicing within their facilities. Those questions implicate both quality of care and economic considerations. We will not lightly adopt a new theory of liability in an area of such significant concern for the public health. We decline to do so here.

735 A.2d at 980.

The issue relating to the dismissal of Relator's Count III is not whether corporate negligence should be adopted in Missouri. The issue is whether Judge Vincent exceeded his jurisdiction by refusing to recognize this cause of action

himself. Judge Vincent was certainly within his discretion in dismissing Relator's Petition for Damages for failure to state a claim in the absence of any Missouri precedent imposing these additional duties on hospitals. The Relator has failed to sustain her burden of proof on this issue.

2. Judge Vincent's actions in dismissing Relator's claim based on ordinary vicarious liability were appropriate.

In Counts I and II of her Petition for Damages, Relator claims vaguely that Columbia Regional (Lifemark) personnel were negligent in providing health care goods and services to Plaintiff beginning on or about January 6, 1999 and continuing through at least February 8, 1999, the nature and extent of which are not presently known. (Writ Petition, Exhibit A, p. 68-69). The Columbia Regional personnel to whom Plaintiff refers would be primarily the nursing staff. Plaintiff does not claim that any of the independent contractor physicians named in the Petition were agents of Columbia Regional other than ostensibly.

Plaintiff attempts to make several claims against defendant Lifemark/ Columbia Regional based on vicarious liability including such things as: failing to ensure that Plaintiff would have a properly sized hospital bed to avoid a loss of skin integrity due to pressure and failing to have a nursing call light and television control within the reach of Plaintiff to avoid further emotional trauma.

(Petition for Writ, Exhibit A, pp. 68-69). Relator claims that the size of her bed and her access to a call light and television remote caused her to suffer the laundry list of injuries described in Paragraph 59 of her Petition for Damages. (Petition for Writ, Exhibit A, p. 71). Relator has therefore attempted to plead, and would like the Court to believe, that a failure to provide an adequately-sized bed and to keep her remote control within reach resulted in such injuries as: permanent paralysis from the waist down, impaired future earning capacity, past and future physical pain and suffering, past and future emotional pain and suffering, incontinence, depression, ulceration of the tongue and mouth and loss of brain function, the nature and extent of which is presently unknown. (Petition for Writ, Exhibit A, pp. 71-72, ¶ 59).

A claimant in a negligence action must plead and prove: "(1) a legal duty on the part of defendant to conform to a certain standard of conduct to protect others against unreasonable risks; (2) a breach of that duty; (3) a proximate cause between the conduct and the resulting injury; and (4) actual damages to the claimant's person or property." *Hill v. Air Shields, Inc.*, 721 S.W.2d 112, 118 (Mo. App. E.D. 1986) (citing *Hoover's Dairy, Inc. v. Mid-American Dairymen, Inc.*, 700 S.W.2d 426, 431 (Mo. 1985)). The facts alleged in Relator's Petition for Damages failed to evoke any duty on the part of Lifemark's employee and did not show any plausible causation.

As discussed previously, in order for defendant to owe a duty to a plaintiff, the harm must be foreseeable. *Pierce v. Platte-Clay Elec. Co-op., Inc.*, 769 S.W.2d at 776 (citations omitted). Judge Vincent could have easily determined, for example, that permanent paralysis from the waist down, ulceration of the tongue and mouth, incontinence and loss of brain function were not a foreseeable result of the size of Relator's bed and the location of the television remote sufficient to establish a duty on the part of any Columbia Regional employee.

For the same reasons, Judge Vincent may have concluded that the facts alleged in Relator's Petition for Damages were insufficient to show causation. In order to prevail, a Plaintiff must be able to show that defendant's conduct was both the cause in fact and the proximate, or legal, cause of the plaintiff's injury. *Coon v. Dryden*, 46 S.W.3d 81, 90 (Mo. App. W.D. 2001). In other words, a plaintiff must be able to state a claim where but for defendant's conduct, the plaintiff's injury would not have occurred. Furthermore, the test for proximate cause is whether the plaintiff's injury was the natural and probable consequence of the defendant's negligence. *Id*. Judge Vincent could have easily determined that permanent paralysis from the waist down, ulceration of the tongue and mouth, incontinence and loss of brain function were not the natural and probable result of the size of Relator's bed or the location of the television remote.

The conclusion Judge Vincent drew is that the Relator resorted to uninvestigated, frivolous and unsubstantiated claims of negligence against Defendant Lifemark for the sole purpose of establishing venue in St. Louis County. The Petition for Damages shows undeniably that the Relator claims her injuries resulted from medical and surgical malpractice, not from any alleged failures of Lifemark employees to provide an adequately sized bed or to keep the television remote within reach.

3. Judge Vincent's actions in dismissing Relator's claim based on vicarious liability for ostensible agents were appropriate.

Mixed in with all her other claims against the other defendants, Relator attempted in her Petition for Damages to assert against Defendant Lifemark a claim of vicarious liability based on the ostensible agency of Dr. James Brocksmith and Dr. Carol Danuser. Relator admits in her Petition for Damages that these physicians were independent contractors and not employed by Defendant Columbia Regional. (Petition for Writ, Exhibit A, p. 55, ¶ 17). However, she then attempts to claim that these physicians were ostensible or apparent agents of Defendant Columbia Regional Hospital. (Petition for Writ, Exhibit A, p. 55, ¶ 17). Judge Vincent's dismissal of Relator's claims against Defendant Lifemark on the grounds of ostensible agency was proper, because Relator failed to sufficiently plead a claim of negligence based on vicarious liability for ostensible agents.

Relator attempts to plead facts in support of her claim that Drs. Brocksmith and Danuser were ostensible agents of Defendant Lifemark, by stating specifically in her Petition for Damages that:

- At all times relevant to this litigation, Drs. Brocksmith and Danuser **were independent contractors, not directly employed by Columbia Regional** but were instead ostensible or apparent agents of Columbia Regional. (Petition for Writ, Exhibit A, p. 55, ¶ 17) (emphasis added).
- At no time did any agent, servant or employee of Defendant Columbia Regional advise Plaintiff that Drs. Brocksmith and Danuser were independent contractors and not agents, servants or employees of Defendant Columbia Regional (Petition for Writ, Exhibit A, p. 55, ¶ 20).

Relator asserts, however, that any negligent acts and/or omissions of Drs. Brocksmith and/or Danuser should be imputed to Defendant Lifemark based on vicarious liability for those acts and/or omissions. (Petition for Writ, Exhibit A, p. 56, ¶ 24). Relator's Petition for Damages fails to state a claim on the basis of ostensible agency because facts essential to establish this agency are not pleaded. *Bramon v. U-Haul, Inc.*, 945 S.W.2d 676, 679 (Mo. App. E.D. 1997) (citation omitted). There is, for instance, no allegation of a representation of agency on the part of Defendant Lifemark, the alleged principal.

Missouri courts have set forth some basic guiding principles for ostensible agency in a medical malpractice setting. In order to establish such ostensible agency, a plaintiff must show: (1) the principal consented to or knowingly permitted the agent to exercise authority; (2) the person relying on such ostensible agency in good faith had reason to believe, and actually believed, the agent possessed authority; and (3) the person relying on the agent's apparent authority changed his/her position and will be damaged if the principal is not bound by the apparent authority exercised by the agent. *Ritter v. BJC Barnes Jewish Christian Health Systems*, 987 S.W.2d 377, 386 (Mo. App. E.D. 1999) (citing *Earl v. St. Louis University*, 875 S.W.2d 234, 238 (Mo. App. E.D. 1994)). As a consequence, "[a]pparent authority cannot be established on the acts of the agent alone. The principal must have created an appearance of authority to be held liable for the acts of the agent." *Id.* Furthermore, "[t]he person dealing with a supposed agent has a duty to ascertain for himself the fact and scope of agency." *Eyberg v. Shah*, 773 S.W.2d 887, 891 (Mo. App. S.D. 1989).

Plaintiff has failed to state a claim in her Petition for Damages due to her failure to plead or establish the requisite elements of ostensible agency:

(a) Acts by the principal creating an appearance of authority in the purported agents, Drs. Brocksmith and Danuser.

(b) Plaintiff's good faith reliance on the reasonable and actual belief that Drs. Brocksmith and Danuser were employees of Columbia Regional Hospital.

(c) Plaintiff's change in position in reliance on her belief that Drs. Brocksmith and Danuser were agents or employees of Columbia Regional Hospital.

(d) Injury to the Plaintiff if Drs. Brocksmith and Danuser are not held to be the ostensible agents of Columbia Regional Hospital.

As stated above, apparent authority cannot be established based only on the acts of the agent. The principal must have somehow created an appearance of authority to be held liable for the acts of the agent. *Ritter*, 987 S.W.2d at 386. Relator's Petition for Damages is devoid of any allegation describing how Columbia Regional created an appearance that Drs. Brocksmith and Danuser were employees or agents of the hospital. Relator's allegations that Defendant Columbia Regional did not advise her that Drs. Brocksmith and Danuser were independent contractors rather than agents or employees, and that Relator did not select these doctors, are insufficient to meet Relator's fact-pleading burden.

It is also clear under Missouri law that Relator had a duty to determine whether any agency relationship existed. *Eyberg v. Shah*, 773 S.W.2d at 891. Relator failed to allege having taken any steps to ascertain whether Drs.

Brocksmith and Danuser were agents or employees of Columbia Regional Hospital.

Missouri courts consistently hold that one essential element of a claim of ostensible agency is that plaintiffs plead and prove that they changed their position in reliance on the apparent authority of the ostensible agent. *Ritter v. BJC Barnes Jewish Christian Health Systems*, 987 S.W.2d at 386; and *Hefner v. Dausmann*, 996 S.W.2d 660, 667 (Mo. App. S.D. 1999). Relator utterly failed to allege or plead facts showing that she changed her position in reliance on the belief that Drs. Brocksmith and Danuser were employees or agents of Columbia Regional Hospital. She has therefore failed to state a claim against Defendant Columbia Regional based on ostensible agency.

A change of position in reliance is a generally accepted requirement of estoppel. *See Chicago Title Ins. Co. v. First Mo. Bank of Jefferson County*, 622 S.W.2d 706, 708 (Mo. App. E.D. 1981) ("The party asserting equitable estoppel must have changed its position for the worse in reliance on the representation or conduct of the person sought to be estopped."). Ostensible agency is also referred to in case law as "agency by estoppel." *State v. Delacruz*, 977 S.W.2d 95, 99 (Mo. App. S.D. 1998). See also *Eyberg*, 773 S.W.2d at 891.

At the time of Relator's admission to Columbia Regional on or around January 6, 1999, after which Relator claims to have suffered injury, a doctor-

patient relationship between Relator and Drs. Brocksmith and Danuser already existed. Based on Relator's Petition for Damages, this relationship had existed since at least September 22, 1999. (Petition for Writ, Exhibit A, p. 57, ¶¶ 28-29). Therefore, Relator had no good-faith reason for believing that these physicians were agents of Defendant Lifemark.

In any case, Relator failed to plead that she changed her position in reliance on her belief that Drs. Brocksmith and Danuser were agents or employees of Columbia Regional Hospital. Plaintiff did not allege that she went to Columbia Regional for treatment by any doctor and not specifically to be treated by her physicians, Drs. Brocksmith and Danuser. Even if Relator had made these allegations, the pre-existing physician-patient relationship between Drs. Brocksmith and Danuser precludes Relator's claim of ostensible agency concerning the only admission at issue in her Petition upon which Defendant Lifemark could potentially be held liable.

As indicated in *Ritter* above, an additional element of ostensible agency or agency by estoppel is a showing that the plaintiff will be injured if the principal is not bound by the conduct undertaken by the purported agent. This last element is a traditional requirement of equitable estoppel. The plaintiff must show that she will be injured if the principal denies the agency relationship. *See Fraternal Order of Police Lodge No. 2 v. City of St. Joseph*, 8 S.W.3d 257, 263 (Mo. App. W.D.

1999). Relator has not, and cannot, plead or prove any injury resulting from a refusal to allow a claim based on ostensible agency

Relator failed to adequately state a prima facie case of negligence against Defendant Lifemark based on the ostensible agency of Drs. Brocksmith and Danuser. Therefore, Judge Vincent did not err in dismissing Relator's vicarious claims in Counts I or II of Plaintiff's Petition for Damages against Defendant Lifemark.

II. RESPONDENTS ARE ENTITLED TO AN ORDER QUASHING THIS COURT'S PRELIMINARY ORDER IN PROHIBITION/ ALTERNATIVE WRIT OF MANDAMUS BECAUSE JUDGE VINCENT'S ACT OF SUSTAINING DEFENDANT LIFEMARK'S MOTION TO DISMISS AND SUSTAINING DEFENDANT BROCKSMITH'S MOTION TO TRANSFER FOR IMPROPER VENUE AND TRANSFERRING THIS CASE TO BOONE COUNTY WAS PROPER, IN THAT DEFENDANT LIFEMARK WAS PRETENSIVELY JOINED FOR THE SOLE PURPOSE OF OBTAINING VENUE.

Relator asserts that the order transferring this action to Boone County was improper because: 1) she did not have fair warning that matters outside her petition would be considered in ruling on Defendants' venue-related motions; and 2) Relator both stated a claim against Defendant Lifemark and had a reasonable good faith belief of a valid claim against that defendant. Respondents disagree. Relator had ample notice that Judge Vincent would take up Respondents' venue challenges and had a full and fair opportunity to present anything she wished Judge Vincent to consider in determining the pretensive joinder issue. Judge Vincent properly found that the record, pleadings, and facts presented in support of the venue-related

motions of Defendants Brocksmith and Lifemark established that there was, in fact, no cause of action against Defendant Lifemark and that the information available to Relator at the time her action was filed would not support a reasonable legal opinion that a case could be made against Defendant Lifemark.

A. Standard of Review

Respondents incorporate by reference herein the standard of review set forth in Point I above.

B. Relator Had Ample Notice and Opportunity to Be Heard on Defendants' Venue-Related Motions.

Relator requests this Court to issue its extraordinary writ transferring this case back to St. Louis County because she had no notice "in the constitutional sense" that Judge Vincent would consider matters "outside the pleadings" in deciding Defendant Brocksmith's pretensive joinder motion without giving Relator more time to respond to such matters. (Relator's Brief, p. 49-50). Relator claims a due process right to notice that Judge Vincent would consider matters outside the pleadings in ruling on Defendant Brocksmith's motion to transfer for pretensive joinder.

Relator claims constitutional violations but failed to preserve these for review. In order to preserve a constitutional claim for review, the claim must be raised at the first opportunity. *State v. Kenley*, 952 S.W.2d 250, 260 (Mo. 1997).

See also, State ex rel. KLRKS v. Allen, 250 S.W.2d 348, 350 (Mo. 1952). This rule "allow[s] the trial court the opportunity to correct errors and avoid prejudice in the first instance." *Kenley*, 952 S.W.2d at 260.

Defendant Lifemark filed its Suggestions in Support of its Motion to Dismiss on March 6, 2001 which contained certain material outside the pleadings and asserted that Lifemark's joinder was pretensive. (Petition for Writ, Exhibit H, p. 100). Defendant Brocksmith expressly incorporated by reference in the Brocksmith Suggestions the Lifemark Suggestions, including the affidavits and medical records. (Respondents' Appendix, A9).

Relator filed no response or objection to either of the aforementioned suggestions and failed to preserve for the record, before, during or after the May 9, 2001 hearing on these motions, any objection she may have made regarding notice or any other issue. Relator also filed no motion for reconsideration alleging a due process violation or any other error subsequent to Judge Vincent's May 18, 2001 ruling.

In short, Relator had every opportunity at the trial court level to assert her constitutional right to due process but failed to do so. She therefore did not preserve any constitutional issue for the present review. Furthermore, she had proper notice and every opportunity to present evidence in opposition to Defendant Brocksmith's pretensive joinder motion, Defendant Lifemark's Motion to Dismiss

contesting venue, and Lifemark's Suggestions in Support asserting pretensive joinder. Relator's constitutional rights were in no way violated.

Relator claims that "Judge Vincent stated he would not consider any matters outside the pleadings" without first giving notice to the parties and giving Relator an opportunity to respond. Yet, this allegation is unsupported by the record before this Court. Relator's counsel, Sean Pickett, filed an affidavit with Relator's Petition for Writ alleging that Judge Vincent told him at the hearing held on May 9, 2001, which he attended by telephone, that no matters outside the pleadings would be considered without notice to the Relator. (Petition for Writ, Exhibit J, p. 206). However, this is not evidence which may be considered by the Court in this writ proceeding. "We cannot consider in this proceeding questions of fact sought to be injected into this case by … an affidavit, as we are limited to the record made in the court below." *State ex rel. Grimes v. Appelquist*, 706 S.W.2d 526, 529 (Mo. App. S.D. 1986).

More importantly, Missouri law does not require the Court to give an opposing party notice that it may consider evidence outside the pleadings in deciding a pretensive joinder challenge. Relator is confusing the notice requirement for the conversion of a motion to dismiss into a summary judgment with a pretensive joinder motion. In the context of a motion to dismiss, notice is required when a motion to dismiss is converted into a summary judgment by the

operation of Rule 55.27. This notice requirement stems from the fact that the Court is deciding the merits of a claim at issue in the case.

In the case of a motion to transfer for pretensive joinder, the Court is not deciding the merits of any claim. The Court is deciding (1) whether the petition states a claim, or (2) whether the record indicates that the information available at the time the petition was filed would not support a reasonable legal opinion that a case could be made against that defendant. *State ex rel. Breckenridge v. Sweeney*, 920 S.W.2d 901, 902 (Mo. 1996). A transfer of venue for pretensive joinder is not a decision on the merits. The court simply decides that the plaintiff's joinder of a particular defendant was a pretense for selecting a particular venue. Because this is not a decision on the merits, the notice required for a summary judgment is not applicable nor does due process require this notice. The plaintiff does not have a constitutional right to a particular venue.

In the present case, Relator knew that Defendants had placed before the court matters outside the pleadings to be considered in determining whether a claim had been stated against Defendant Lifemark, both with respect to Defendant Lifemark's motion to dismiss and for purposes of Defendant Brocksmith's motion asserting pretensive joinder. Relator's counsel were aware as early as February 13, 2001, and no later than March 6, 2001, that Defendants Lifemark and Brocksmith had presented matters outside the pleadings in support of their motions

challenging venue on the basis of pretensive joinder. Relator had more than sixty (60) days within which to present any opposing evidence or argument with respect to these motions. Relator made no effort before or after the hearing of May 9, 2001, to present any evidence or argument to Judge Vincent for consideration.

Moreover, as is evidenced by her Motion in Opposition to Defendant Brocksmith's Motion to Transfer Venue, Relator was aware: 1) that Rule 51.045 required a reply by Relator to Defendants' venue challenges to avoid transfer;[2] and 2) that under the applicable law enunciated by this Court, the trial court would determine the pretensive joinder issue on the pleadings and the record, affidavits, and facts presented in connection with defendants' venue-related motions. Clearly, Relator had ample notice and full opportunity to present to Judge Vincent any matter bearing on the pretensive joinder issue that Relator desired the Court to

[2] Although Relator filed a response under Rule 51.045 to Defendant Brocksmith's motion challenging venue, no such response has ever been filed by Relator to the similar venue-related motions of the remaining defendants. Additionally, it is apparent by review of Relator's response to Defendant Brocksmith's motion that relator actually was responding untimely to a venue challenge made on behalf of Defendant Steinke rather than Brocksmith.

consider. The Missouri Rules of Civil Procedure afforded Relator all the process due, constitutionally or otherwise.

Lack of notice is not a valid issue in this case. Lack of notice where none is required does not show an excess of jurisdiction by Judge Vincent.

C. Judge Vincent did not err in transferring this case because the first ground for pretensive joinder was established in that Relator failed to state a claim against defendant Lifemark.

Courts will not allow plaintiffs to engage in the pretense of joining defendants for the sole purpose of obtaining venue. *State ex rel. Malone v. Mummert*, 889 S.W.2d 822, 824 (Mo. 1994). This Court stated in *Breckenridge* that:

> Venue is pretensive if (1) the petition on its face fails to state a cause of action against the resident defendant; or (2) the petition does state a cause of action against the resident defendant, but the record, pleadings and facts presented in support of a motion asserting pretensive joinder establish that there is, in fact, no cause of action against the resident defendant and that the information available at the time the petition was filed would not support a reasonable legal opinion that this cause could be made against the resident defendant.

920 S.W.2d 901, 902 (Mo. 1996).

Judge Vincent granted Defendant Lifemark's Motion to Dismiss for failure to state a claim. Respondents demonstrated in their Point I that this decision was proper and not an excess of jurisdiction. Therefore, the first ground for pretensive joinder is satisfied and the transfer to Boone County was proper.

D. Even if Relator did technically state a claim against Defendant Lifemark, the transfer of this case was still proper because the second ground for pretensive joinder was satisfied.

Even if Relator's Petition for Damages did state a claim against Defendant Lifemark, Judge Vincent's transfer would still be appropriate based on the second ground for pretensive joinder. An error of Judge Vincent in sustaining Lifemark's Motion to Dismiss does not render his transfer for pretensive joinder improper.

> A finding of pretensive joinder and subsequent transfer is also proper when the petition does state a cause of action against the resident defendant, but the record, pleadings and facts presented in support of a motion asserting pretensive joinder establish that there is, in fact, no cause of action against the resident defendant and that the information available at the time the petition was filed would not support a reasonable legal opinion that a case could be made against the resident defendant.

Breckenridge, 920 S.W.2d at 902. Subsequent interpretation of this opinion by this Court indicates that a *prima facie* showing on this second ground is made upon proof that "the facts known to the plaintiffs when the suit was filed did not support a reasonable legal opinion that a valid claim existed." *State ex rel. Smith v. Gray,* 979 S.W.2d 190, 194 (Mo. 1998).

Again, a decision under the second ground is not a decision on the merits of a plaintiff's claim in the nature of a summary judgment. It constitutes a determination that the plaintiff has asserted a claim against a defendant for the purpose of obtaining a particular venue but that this choice of venue is pretensive for lack of sufficient facts to support a belief in the claim.

Furthermore, materials outside the pleadings may be considered by the Court in deciding a pretensive joinder motion on this second ground. This Court clearly stated in *Breckenridge* that "the record, pleadings and facts presented in support of a motion asserting pretensive joinder" may be considered. *Id*. Material outside the pleadings was also considered in the post-*Breckenridge* case of *Hefner v. Dausmann,* 996 S.W.2d 660, 664 (Mo. App. S.D. 1999).

In Defendant Brocksmith's Motion to Dismiss or Transfer for Improper Venue of February 13, 2001, this defendant alleged that Defendant Lifemark had been pretensively joined because Relator "could not have had a reasonable good faith belief of liability on the part of the purported anchor defendant, Lifemark."

(Petition for Writ, Exhibit E, p. 88). Relator responded by filing a Memorandum and Suggestions in Opposition asserting that Defendant Brocksmith had not provided proof of his pretensive joinder allegations. (Petition for Writ, Exhibit F, p. 92-97). Defendant Brocksmith then filed Reply Suggestions in Support of his Motion to Dismiss or Transfer for Improper Venue (Respondents' Appendix, A9), which Relator conveniently omits as an exhibit to her writ petition.

In Defendant Brocksmith's Reply Suggestions, he refers to the record before the Court, namely Defendant Lifemark's Suggestions in Support of its Motion to Dismiss, as support for his assertions under this second ground for pretensive joinder. Defendant Brocksmith stated "[w]hen the affidavits and evidence submitted by defendant Lifemark are considered, it is clear that plaintiff could not have had a reasonable good faith belief of a viable claim against defendant Lifemark." (Respondents' Appendix, A17).

At the time of Judge Vincent's decision regarding pretensive joinder the exhibits and other materials submitted with Defendant Lifemark's suggestions were part of the record. No objection to these materials was ever filed by the Relator. Therefore, in this review the Court must examine Defendant Lifemark's Suggestions in Opposition and the exhibits and other materials submitted with it to determine if Judge Vincent correctly concluded that Relator could not, and did not,

have a "reasonable legal opinion that a valid claim existed" at the time she filed suit.

The Affidavit of James T. Brocksmith (Petition for Writ, Exhibit H-1, p. 138-140) attached to Defendant Lifemark's Suggestions in Support provided the following evidence:

a. Dr. Brocksmith never represented to Relator that he was an employee or agent of Lifemark;

b. Dr. Brocksmith had treated Relator since at least November 1996 and treated her in his private office on many occasions;

c. Relator was aware that he was not an employee or agent of Lifemark;

d. Relator's bills from Dr. Brocksmith were separate from any bills from Lifemark and were never on Lifemark letterhead;

e. Relator signed admission forms stating that many of the physicians at Lifemark were independent contractors and not employees; and

f. To a reasonable degree of medical certainty, the injuries Relator claims to have suffered could not have been caused by and are not the reasonable and probable consequence of the alleged conduct of Lifemark employees.

This evidence was in the record before Judge Vincent and uncontroverted by the Relator.

The Affidavit of James C. Poehling (Petition for Writ, Exhibit H-2, p. 141-146) attached to Defendant Lifemark's Suggestions in Support provided the following evidence:

a. Relator signed admission forms acknowledging her understanding that many of the physicians at Lifemark were independent contractors and not employees;

b. The selection of physicians to provide care to Relator, including Drs. Brocksmith and Danuser, was done by Dr. Buchert as the attending physician and were not chosen by Lifemark;

c. All independent contractor physicians using Lifemark facilities, including Drs. Brocksmith and Danuser, maintain separate liability insurance covering malpractice;

d. The bed provided to Ms. Nickels was a rotokinetic bed ordered by Dr. Thomas Highland, Relator's back surgeon, an independent contractor and not an employee of Lifemark;

e. The nurse's notes and other medical records show that the bed's alignment and settings were properly checked every day by the nurses;

f. The nurse's notes and other medical records show that nursing staff regularly verified that the call light and television remote were with Relator's reach.

Medical records referenced in James Poehling's affidavit testimony were also attached as an exhibit to Defendant Lifemark's Suggestions in Support. (Petition for Writ, Exhibit H-3, p. 147-193). An affidavit verifying these medical records from the medical records custodian was also provided with the records.

All of the aforementioned evidence was in the record before Judge Vincent when he ruled on the pretensive joinder issue. Relator filed no objection to this evidence. Relator makes a vague assertion in her Brief that this evidence is improper hearsay. (Relator's Brief, p. 52-53). Yet, Relator made no such objection at the trial court, and thereby waived the objection. Moreover, Relator's assertion that Defendants' affidavits are inadmissible hearsay which could not be considered by Judge Vincent is without merit. Rule 55.28 expressly provides:

> When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

While Respondents have argued in their Point I that Judge Vincent could have sustained Defendant Lifemark's Motion to Dismiss for failure to state a claim

without considering this evidence, Defendant Lifemark did provide an extensive argument in its Suggestion in Support (Petition for Writ, Exhibit H, p. 100-193) as to how the evidence submitted with its suggestions showed that Relator could not have any reasonable basis for her claim at the time she filed the lawsuit. Relator also submitted no evidence or argument that any subsequently learned information supported her claim.

Judge Vincent could have properly concluded that all of the aforementioned information (e.g., medical records and knowledge of the circumstances of her treatment) was available to Relator at the time she filed her lawsuit in St. Louis County against Defendant Lifemark and others. Based on this evidence, Judge Vincent could have readily concluded that the information available at the time the suit was filed did not support a reasonable legal opinion that a valid claim existed against Defendant Lifemark. *Breckenridge*, 9205 S.W.2d at 402. These conclusions are undeniable.

Furthermore, Judge Vincent could have properly concluded that the facts Relator **knew** at the time she filed her Petition did not support a reasonable legal opinion that she had a viable claim against Defendant Lifemark.

In the present case, Relator alleges both vicarious and direct liability on the part of defendant Lifemark. The allegations of direct liability are contained in Paragraph 56 and include allegations that are frivolous on their face, i.e., failing to

have a television remote control within Relator's reach to avoid "emotional trauma." The vicarious liability allegations relate to assertions that individual physician defendants Brocksmith and Carol Danuser, M.D., acted as "the ostensible or apparent agents of" Defendant Lifemark. (Petition for Writ, Exhibit A, p. 56 ¶ 24))

Relator's own Petition, on its face, demonstrates that at the time of filing, Relator knew that Defendants Brocksmith and Danuser were not Defendant Lifemark's agents. Paragraph 17 of Relator's Petition for Damages states in its entirety:

> 17. At all times relevant to this litigation, Drs. Brocksmith and Danuser **were independent contractors, not directly employed by Columbia Regional**, but were instead the ostensible or apparent agents of Columbia Regional.

(Petition for Writ, Exhibit A, p. 55 ¶ 17) (emphasis added). Similarly, in Paragraph 20 of her Petition, Relator asserts further that, "no one told Miss Nickels that Drs. Brocksmith and Danuser were independent contractors, and **were not the agents, servants, or employees of Columbia Regional"** (emphasis added). The test is what Relator reasonably knew or should have known **at the time of filing her Petition for Damages** concerning the relationship between Defendants

Brocksmith, Danuser, and Lifemark (Columbia Regional). The face of Relator's Petition demonstrates she knew at the time of filing that Defendants Brocksmith and Danuser were not the agents of Defendant Lifemark. Relator could not possibly have had a reasonable good faith belief of a valid claim against Defendant Lifemark on an apparent or ostensible agency theory for the acts of Defendants Brocksmith and Danuser. Moreover, even if Relator had not pled herself out of this claim of vicarious liability on the part of Defendant Lifemark, Relator failed to state a claim based on apparent or ostensible agency in that Relator's Petition contains no allegation of a representation of agency on the part of Defendant Lifemark, the alleged principal. *Jeff-Cole Quarries, Inc. v. Bell*, 454 S.W.2d 5, 13 (Mo. 1970).

Even if the dismissal of Defendant Lifemark for failure to state a claim was in error (which Respondents deny), Judge Vincent had sufficient evidence in the record and in support of Defendant Brocksmith's motion to transfer for pretensive joinder to sustain this motion on the second ground set forth in *Breckenridge.*

However, on prohibition this Court should not second guess the discretionary decisions of Judge Vincent. This Court's sole inquiry must be whether there was **any basis** for his transfer. This Court should not weigh the evidence in support of the second ground for pretensive joinder. Judge Vincent had evidentiary support for his decision in the record. Relator made no objection

and adduced no contrary evidence. It would be impossible for the Court to conclude that Judge Vincent abused his discretion so greatly in this decision that it constituted an excess of jurisdiction. *Breckenridge* indicates that the trial judge must consider the record and render a decision on pretensive joinder. Judge Vincent did precisely that. Relator has not sustained her burden to show an excess of jurisdiction on this matter.

It would be premature for this Court to issue a permanent writ in this case ordering the case transferred back to Boone County. One of the named defendants, Carol Danuser, M.D., has not been properly served. The general rule in Missouri is that one defendant may not waive venue as to another defendant who has not appeared before the court. *Washington University v. ASD Communications, Inc.*, 821 S.W.2d 895, 896 (Mo. App., E.D. 1992), citing *Sullenger v. Cooke Sales & Service Co.*, 646 S.W.2d 85, 88 (Mo. Banc 1983). Consequently, even if this Court were to determine that the transfer of this case based on the defendants' motions who have already appeared in the trial court below was improper, there should not be a permanent decision of the issue at this time. Rather, any permanent decision should wait until such time as all of the defendants have been served and given an opportunity to raise any objection to improper venue.

CONCLUSION

For the above set-forth reasons, Respondents Vincent and Conley respectfully request that this Court quash the preliminary writ of prohibition and deny Relator's petition for a permanent writ and for whatever further relief this Court deems fair and just in the premises.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Respondents' Brief and one copy on 3.5" diskette were sent via first class mail, postage prepaid on this 15th day of November, 2001, to:

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with Rule 55.03 of Missouri Rules of Civil Procedure.

2. This brief complies with the limitations contained in Rule 84.06(b) of the Missouri Rules of Civil Procedure.

3. This brief was prepared with Microsoft Word and contains 12,182 words.

4. The diskette and file containing this brief have been scanned for viruses and were found to be virus free.

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APPENDIX